UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

COMBUSTION ENGINEERING, INC.,	)	
	)	
Plaintiff/Counterclaim Defendant	)	
	)	
v.	)	
	)	
MILLER HYDRO GROUP,	)	
Defendant/Counterclaim Plaintiff	)	
	)	
v.	)	*Civil No. 89-0168 P*
	)	
KANSALLIS-OSAKE-PANKKI,	)	
	)	
Party-in-Interest	)	
	)	
and	)	
	)	
ALDEN RESEARCH LABORATORY, INC.,	)	
	)	
Counterclaim Defendant	)	

ORDER ON DEFENDANT MILLER HYDRO GROUP'S MOTION TO COMPEL AND PLAINTIFF COMBUSTION ENGINEERING, INC.'S CROSS-MOTION FOR A PROTECTIVE ORDER

Defendant Miller Hydro Group (``Miller Hydro") has filed a motion to compel production of documents and answers to interrogatories in which it asserts four grounds for compelling discovery from plaintiff Combustion Engineering, Inc. (``Combustion Engineering"). First, Miller Hydro alleges that Combustion Engineering has waived its attorney-client privilege and work-product

immunity by voluntarily releasing at least 33 documents and one affidavit[1]. Second, Miller Hydro contends that Combustion Engineering attorney Richard Austin participated in a scheme to defraud Miller Hydro, thereby vitiating the attorney-client privilege as to underlying communications. Third, Miller Hydro seeks to compel production of documents regarding a separate hydroelectric project on the ground that the information is sufficiently relevant to its case. Finally, Miller Hydro seeks, on fairness grounds, to compel answers to its interrogatory regarding past Combustion Engineering lawsuits. Miller Hydro asks that it be awarded the expenses of the instant motion pursuant to Fed. R. Civ. P. 37(a)(4). Combustion Engineering opposes all four requests and, in addition, through its own cross-motion for a protective order, seeks the return of 33 privileged documents it alleges were inadvertently released. For the reasons set forth below, I hereby ***DEFER*** ruling on Miller Hydro's request for production of documents on the separate hydroelectric project; ***GRANT***, in part, Miller Hydro's request for further information on Combustion Engineering's lawsuits; ***DENY*** Miller Hydro's remaining requests and ***GRANT*** Combustion Engineering's cross-motion for the return of 33 documents.

[1] For purposes of its motion, Miller Hydro assumes *arguendo* that the documents in issue are privileged, referring apparently both to the attorney-client privilege and work-product immunity doctrine. Miller Hydro reserves the right to challenge Combustion Engineering's claims of attorney-client privilege. *See, e.g.*, Defendant Miller Hydro Group's Memorandum of Law in Support of its Motion to Compel Production of Documents and Answers to Interrogatories by Plaintiff Combustion Engineering, Inc. (``Defendant's Memo'') at 14 n.9. For convenience, aggregate references herein to ``privileged'' materials will include work-product materials.

I. Waiver By Voluntary Release

A. Dispute Over 33 Documents

Combustion Engineering filed the instant lawsuit against Miller Hydro to recover more than $10 million it claims it is owed under the incentive payment provision of a contract to build a hydroelectric facility on the Androscoggin River in Lisbon Falls, Maine (``Worumbo project''). Miller Hydro propounded to Combustion Engineering comprehensive discovery requests beginning with a Request for Production I (``RFP I'') served on August 28, 1989. In response, counsel for Combustion Engineering devised a screening process to guard against release of privileged materials. An attorney at Skadden, Arps, Slate, Meagher & Flom (``Skadden Arps''), Combustion Engineering's national counsel, spent more than 200 hours in a three-month period reviewing each document for privilege. The attorney reviewed every single document twice, listing the Bates numbers of all for which privilege was claimed. The privileged-document list then was sent to Combustion Engineering's local counsel, Bernstein, Shur, Sawyer & Nelson (``Bernstein Shur''). As per the instructions of the Bernstein Shur attorney supervising the case, a Bernstein Shur paralegal removed the privileged documents identified by Skadden Arps. Each culled document was placed in a separate, bright yellow file and immediately taken out of the document production room.

On January 17, 1990 Combustion Engineering answered RFP I. It sent more than 100,000 pages of documents to Miller Hydro as well as an accompanying list of privileged documents dated January 16, 1990. Miller Hydro immediately began poring over these files and soon noticed that several clearly privileged documents had been released. On February 2, 1990 Miller Hydro appended one of the privileged documents, an internal Combustion Engineering memo from R.D. Austin to C.E. Barnett (``Barnett memo''), as an exhibit to attachment papers filed with this court. To this,

Combustion Engineering had no response. On March 7, 1990 Miller Hydro counsel George S. Isaacson wrote Bernstein Shur attorney John H. Montgomery informing him of ``the release of certain documents" believed to be privileged. In a letter to Isaacson dated March 27, 1990 Montgomery responded that the disclosure of the Barnett memo was unintentional and not to be construed as a waiver of the attorney-client privilege. In a further exchange of letters, Miller Hydro continued to assert that privileged documents had been released and waiver thereby effected; Combustion Engineering persisted in contending that the disclosures had been unintentional and that the documents' privileges remained intact. Miller Hydro enumerated which assertedly privileged documents had been released in its filing of the instant motion with this court on May 2, 1990. In a letter dated May 14, 1990, Combustion Engineering reiterated that the disclosure was completely inadvertent and, for the first time, demanded the return of 33 inadvertently released documents.

While not seriously disputing the above-described sequence of events, the parties clash sharply over the inferences to be drawn therefrom. Miller Hydro asserts that Combustion Engineering ``intentionally disclosed privileged information to bolster its case," Defendant's Memo at 2, selectively choosing to release favorable documents. Combustion Engineering avers that most of the 33 documents at issue were among those listed by Skadden Arps as privileged and that the rest were inadvertently overlooked by Skadden Arps. It further explains that the listed documents it released likewise were overlooked by the Bernstein Shur paralegal.

After careful consideration of all materials submitted by the parties, I am persuaded that Combustion Engineering's release of the 33 documents in issue was inadvertent. Miller Hydro's naked assertions of deliberate, selective release of documents are adequately rebutted by Combustion Engineering's detailed description of its screening process and its consistent assertions of privilege.

Accordingly, I decline to consider caselaw cited by the parties regarding deliberate and/or selective release of privileged documents.

Miller Hydro next contends that, even if Combustion Engineering's 33 documents were released inadvertently, Combustion Engineering still should be found to have waived the privilege. Resolution of this issue requires reference to two separate sources of law. In a diversity case such as this, questions surrounding invocation of privileges, including the attorney-client privilege, are controlled by the law of the state supplying the underlying rule of decision. Fed. R. Evid. 501; *Gagne v. Ralph Pill Elec. Supply Co.*, 114 F.R.D. 22, 24-25 (D. Me. 1987). In the instant case, the parties stipulated by contract, *see* Exh. A to Complaint, art. XXIV ' 24.09, that Maine law would control the resolution of any disputes; Maine law thus governs the issue of attorney-client privilege. Federal law, on the other hand, controls issues surrounding the work-product immunity doctrine even in diversity cases because Fed. R. Civ. P. 26(b)(3) explicitly addresses work product. *Gagne*, 114 F.R.D. at 26. As a practical matter, however, the result in the instant case is the same. Neither the parties nor the court has unearthed any decision of the Court of Appeals for the First Circuit or this court illuminating whether inadvertent disclosure waives work-product immunity. The text of the rule and accompanying notes also fail to shed light on this issue. I therefore conclude that the fairest and most consistent course is to apply the same analysis to inadvertent disclosure of both attorney-client and work-product documents.[2]

Maine Rule of Evidence 510 provides, in relevant part, for waiver of the attorney-client privilege if the holder ``voluntarily discloses or consents to disclosure of any significant part of the

[2] I note that, in the instant case, Maine and federal law are close cousins. The Maine rules of evidence addressing privilege were largely modelled on proposed federal rules of evidence that continue to guide federal courts although they never were adopted by Congress. R. Field & P. Murray, *Maine Evidence* xxiii-iv (1987) (hereinafter *Field & Murray*).

privileged matter." Neither the parties' nor my own research has revealed a single case construing this Maine rule in the context of inadvertent disclosure; this question thus is one of first impression in Maine. Miller Hydro contends that Me. R. Evid. 510 incorporates the traditional common-law view that any disclosure waives the attorney-client privilege, regardless of intent. *See, e.g.*, Note, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1660-61 (1985). Combustion Engineering, on the other hand, invites the court to construe Maine's rules as adopting the broad approach of cases such as *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982), under which unintentional disclosure never waives the privilege. In so urging, Combustion Engineering relies exclusively on Me. R. Evid. 502(a)(5), which defines a communication as ``confidential" if it is

> not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

I agree with Miller Hydro that Me. R. Evid. 510 is determinative of this issue. Maine Rule of Evidence 502(a)(5) purports only to define privilege at the outset; waiver specifically is covered by Me. R. Evid. 510. I believe, however, that Miller Hydro has misconstrued the meaning of the key phrase ``voluntarily discloses." In the absence of caselaw guidance, I find the leading commentary accompanying Me. R. Evid. 510 instructive:

> A more difficult problem is when the holder's conduct should in fairness amount to waiver. A client, for instance, should not be allowed to state his reliance upon his lawyer's advice and then assert his privilege not to let the lawyer testify about the advice actually given.

Field & Murray at ' 510.1.

This commentary contemplates that some, but by no means all, conduct will amount to waiver -- regardless of subjective intent to waive. Neither Miller Hydro's nor Combustion Engineering's

preferred interpretation accurately captures the spirit of this rule. Instead, I adopt the middle-of-the-road approach exemplified by *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), *aff'd* 799 F.2d 867 (2d Cir. 1986). *Lois* fashions a sensible and fair test for waiver in this world of complex, document-laden litigation. The *Lois* test essentially is one of negligence. If the party, through counsel, adequately safeguards its privilege, inadvertent error is forgiven. If not, the privilege is forfeited, no matter how earnestly the client and/or his lawyers desired to preserve it. *Lois* outlines four factors helpful in assessing negligence: whether reasonable precautions were taken to screen documents; the time taken to rectify the error; the scope of the discovery and extent of disclosure; and overriding interests of justice. *Id.* at 105.

Employing the *Lois* factors, I am persuaded that Combustion Engineering did not waive its attorney-client privilege.

1. Reasonableness of Precautions

Combustion Engineering's precautions were reasonable. A Skadden Arps attorney spent 200 hours reviewing every document twice; a Bernstein Shur paralegal carefully removed the listed documents and took them out of the production room.

2. Scope of Production

Roughly 33 documents, comprising about 100 pages by my count, accidentally slipped into a production of more than 100,000 pages -- approximately one-tenth of 1 percent.

3. Time and Steps Taken to Rectify Error

For whatever reason, Combustion Engineering chose not to protest Miller Hydro's filing of the privileged Barnett memo in this court in February. However, since March 27 Combustion Engineering consistently has claimed privilege for the inadvertently released documents. Given the size and complexity of this litigation -- and the fact that Combustion Engineering initially was unaware

of the full scope of inadvertent disclosure -- I do not find the lag time between early February and late March enough to waive the privilege. Miller Hydro emphasizes the fact that Combustion Engineering did not demand the return of any documents until May 14, and that it has failed to seek the return of a 34th privileged document. I find that the record does not demonstrate negligent disregard for preservation of the privilege. Since March 27 Combustion Engineering has firmly and repeatedly asserted its position of non-waiver. Combustion Engineering's actions regarding the 34th document, the Barnett memo, similarly are consistent with non-waiver. That memorandum, comprising pages bearing Bates numbers W-00017873-76, was designated as privileged on the list sent to Miller Hydro on or about January 17, 1990. *See* Exh. MM to Defendant's Memo. Moreover, Combustion Engineering has claimed it as privileged in correspondence with Miller Hydro and in its memorandum submitted in opposition to Miller Hydro's motion. Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel Production of Documents and Answers to Interrogatories (``Plaintiff's Memo") at 6 n.5. Finally, I note that Combustion Engineering does demand the return of a nearly identical document, Bates numbers W-00056946-48, that appears to be a later, corrected version of the same Barnett memo. Exh. R to Defendant's Memo; Exh. E to Plaintiff's Memo at 2.

4. Interests of Justice

Miller Hydro will suffer no unfair prejudice by having to return the inadvertently released documents. Miller Hydro has not demonstrated sufficient reliance on the privileged documents to jeopardize its litigation strategy unfairly. Indeed, it has been on notice of the dispute concerning these documents since March 1990.

B. Dispute Over Austin Affidavit

Miller Hydro contends that Combustion Engineering has waived its attorney-client privilege concerning matters covered in an affidavit filed in this court by Richard D. Austin, in-house counsel for Combustion Engineering. Exh. D to Defendant's Memo. Unlike the 33 documents discussed above, the Austin affidavit unquestionably was intentionally released in connection with Combustion Engineering's efforts to procure an attachment against Miller Hydro, as Miller Hydro notes. Miller Hydro alleges that attorney Austin's affidavit is ``replete with the `understandings' and `intentions' of Combustion's management regarding critical provisions of the turnkey contract and subordination agreement." Defendant's Memo at 6. Therefore, Miller Hydro asserts, Austin's statements impliedly waive the privilege as to the confidential communications underpinning them.

I agree with Combustion Engineering that the Austin affidavit does not trigger waiver under relevant Maine law. Maine Rule of Evidence 502(b) applies the privilege only to ``confidential communications." The leading commentators on Maine evidence observe: ``Only the communication is confidential. The client cannot be asked what he told his lawyer, but inquiry may be made about the facts underlying the communication." *Field & Murray* at ' 502.4. The Austin affidavit, at most, touches upon facts underlying communications to or from attorney Austin. Nowhere are actual communications disclosed.

II. Waiver By Virtue of Alleged Fraudulent Scheme

As Miller Hydro correctly observes, under Maine law the attorney-client privilege is vitiated ``[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Me. R. Evid. 502(d)(1). This court, construing Me. R. Evid. 502(d)(1) in *Gagne*, held that a party must present *prima facie* evidence of fraud to justify stripping the privilege on this ground. *Gagne*, 114 F.R.D. at 25.

The moving party need not prove that the attorney knew of the client's fraud or that the client intended to employ the attorney in furtherance of the fraud. *In re Sealed Case*, 676 F.2d 793, 812, 815 (D.C. Cir. 1982), *cited by Gagne*, 114 F.R.D. at 25. Instead, the relevant inquiry is (1) whether there has been a *prima facie* showing that the client committed fraud; and (2) if so, whether the privileged material reasonably relates to the subject matter of the fraud. *In re Sealed Case*, 676 F.2d at 814-15.

Prima facie evidence is ``such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 1071 (5th ed. 1979). In Maine, a party must prove fraud by clear and convincing evidence of each of five elements: (1) the making of a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of its truth or falsity; (4) for the purpose of inducing another to act in reliance upon it; and (5) justifiable reliance by the other upon the representation as true, causing him to act upon it to his damage. *Arbour v. Hazelton*, 534 A.2d 1303, 1305 (Me. 1987). To be ``clear and convincing," evidence must establish a factual conclusion to be highly probable. *Taylor v. Commissioner of Mental Health & Mental Retardation*, 481 A.2d 139, 154 (Me. 1984). Against the backdrop of this controlling caselaw, I have examined whether Miller Hydro's evidence establishes a high probability of fraud. Mindful that Miller Hydro must make out only a *prima facie* case, I have concentrated on its submissions rather than weighing its evidence against that offered in rebuttal by Combustion Engineering.

Miller Hydro essentially alleges that Combustion Engineering placed oversized turbines in the Worumbo hydroelectric project and then misrepresented the turbines' size to Miller Hydro and others as part of a covert scheme to reap a windfall incentive bonus. Miller Hydro presents evidence bearing

on two separate dimensions of the turbines' allegedly fraudulent oversize: hydraulic capacity, expressed in cubic feet per second (``cfs"), and electrical generating capacity, expressed in kilowatts (``KW"), megawatts (``MW") or gigawatts (``GW"). A kilowatt equals 1,000 watts. The Random House College Dictionary 737 (Rev. Ed. 1982). A megawatt equals 1 million watts, *id.* at 832, and a gigawatt equals 1 billion watts, *id.* at 556. The facility's electrical output -- the energy it could sell to a customer -- is expressed either in kilowatt-hours (``KWH"), megawatt-hours (``MWH") or gigawatt-hours (``GWH"). The incentive bonus that is at the heart of this lawsuit concerns money allegedly owing for annual output greater than 77,500,000 KWH. Contract, Art. XXII ' 22.1 (``Contract"), Exh. 1 to the Affidavit of Mark Isaacson (``Isaacson Affidavit") appended as Exh. A to Defendant Miller Hydro Group's Memorandum in Opposition to Plaintiff Combustion Engineering, Inc.'s Motion for Approval of Attachment, Including Trustee Process. Output, as expressed in KWH, MWH or GWH, is thus the one measurement that is of unquestionable significance in this lawsuit. Unfortunately, Miller Hydro and Combustion Engineering have yet to demonstrate precisely how turbine size affects electrical output. Nothing in the record clarifies how hydraulic capacity interacts with generating capacity to determine output, or for that matter whether one type of capacity is more vital than another in determining output. For the narrow purpose of resolving the instant discovery dispute, I will presume that a facility's hydraulic and generating capacities each have critical bearing on its total output.

After careful review, I find that Miller Hydro's evidence makes out a clear and convincing case of the first three elements of fraud but not the final two. Miller Hydro therefore fails to make out a case sufficient to vitiate Combustion Engineering's attorney-client privilege.

A. Making of a False Representation

Miller Hydro presents clear and convincing evidence that Combustion Engineering misrepresented turbine size. Combustion Engineering negotiated for the purchase of two turbines with a ``Turbine Flow at Guaranteed Output'' of 4,520 cfs each, or 9,040 cfs total, prior to the finalization of the parties' contract on May 29, 1986. Exhs. A-C to the Affidavit of David W. Bertoni in Support of Miller Hydro's Opposition [to] Combustion Engineering's Motion for Attachment (``Bertoni Affidavit #1''). Combustion Engineering ordered those units on June 10, 1986. Exh. D to Bertoni Affidavit #1. As of May 1986 Combustion Engineering knew the hydraulic capacity of these units.[3] Combustion Engineering knew the turbines' generating capacity no later than August 29, 1986, the date of an E.C. Jordan document noting a ``max generation'' of 18.4 MW. Exh. FF to Bertoni Affidavit #2. Nonetheless, Combustion Engineering misrepresented hydraulic size in a 1986 meeting with agency personnel and in 1986 conversations with employees of its subcontractor E.C. Jordan. Combustion Engineering also misrepresented both hydraulic and generating capacity in a press release.

John Tarbell, formerly project manager of the Worumbo project for E.C. Jordan, avers that he advised David W. Bintz of Combustion Engineering on September 11, 1986 that state and federal

[3] *See also* Exh. P to the Affidavit of David W. Bertoni (``Bertoni Affidavit #2'') (document dated April 26, 1987 from files of E.C. Jordan Company (``E.C. Jordan'') containing calculations in which ``flow through powerhouse is 10,000 CFS +/- (max)''); Exh. EE to Bertoni Affidavit #2 (notes from July 8, 1986 meeting attended by employees of E.C. Jordan and Combustion Engineering, memorializing ``Proposed P/H 9300 CFS (+/-) capacity''). E.C. Jordan was the engineering subcontractor for Combustion Engineering on the Worumbo project. Affidavit of John Tarbell (``Tarbell Affidavit'') & 2.

regulatory personnel were likely to inquire into the project's hydraulic capacity at a meeting the following day. Tarbell Affidavit at && 2, 5, 7. Tarbell warned Bintz that design criteria for the fishway were keyed to hydraulic capacity and that Tarbell had data indicating that total hydraulic capacity might be in excess of 7,800 cfs. *Id.* at & 7. Tarbell told Bintz that he would rely on him to handle the inquiry; Bintz responded that he would take care of it. *Id.* Tarbell's contemporaneous report of the next day's meeting, attached to his affidavit as Exhibit A, shows that in response to a direct question from Ben Rizzo of the U.S. Fish & Wildlife Service

> Mr. Isaacson and Mr. Bintz both answered that the capacity of the units was 7,800 cfs total. Mr. Bintz then noted that the best gate flow would be approximately 7,000 cfs.

In his deposition, Bintz is said to have testified that Isaacson alone made the statement, but that he knew it was false when made and took no steps to alert either Miller Hydro or the U.S. Fish & Wildlife Service of the falsity. Defendant Miller Hydro Group's Submission to the Magistrate Regarding Prejudice Caused by Plaintiff's Failure to Produce Documents at 15 n.9.

John Devine, formerly lead engineer for E.C. Jordan, described a separate incident in which he informed Bintz and Michael J. Popovitch of Combustion Engineering in June 1986 that the turbines' hydraulic capacity was inconsistent with that specified in the E.C. Jordan subcontract and the Federal Energy Regulatory Commission (``FERC'') license. Affidavit of John Devine (``Devine Affidavit'') && 2, 12-13. According to Devine,

> Messrs. Bintz and Popovitch responded that they recognized the inconsistency, and stated they would provide E.C. Jordan with direction on what value of flow should be used for design purposes. Further, E.C. Jordan was then instructed to disregard the reference to 9000 cfs. They also stated that E.C. Jordan was not to discuss the issue of the hydraulic capacity of the facility with Cianbro Corporation, the construction contractor for the Worumbo Project. E.C. Jordan had been similarly instructed not to discuss such issues with Miller Hydro Group, the project developer. At a later date, Combustion

> Engineering directed E.C. Jordan to use a value of 7800 cfs for the design of the facility.

Id. at & 13. Consistent with Devine's assertion, design criteria for a fish passageway dated January 8, 1987 and contained in Combustion Engineering's files show ``Max Operating Conditions" of ``7,800 cfs through the powerhouse." Exh. S to Bertoni Affidavit #1.

Finally, a press release sent from Bintz of Combustion Engineering to Tarbell of E.C. Jordan on June 23, 1986 described the project as having a generating capacity of ``approximately 17,000 KW" and a rated hydraulic capacity of 7,800 cfs. Exh. V to Bertoni Affidavit #2.

Miller Hydro makes much of Combustion Engineering's purportedly false reassurances that its work conformed to the contract and to FERC license requirements. However, I find the contract[4] and the FERC license[5] sufficiently ambiguous to rule out the possibility that Combustion Engineering asserted in good faith that its turbines did conform. Indeed, Combustion Engineering continued to

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[4] Contract art. I ' 1.7, for example, defines the ``Facility" as being built ``substantially" in accordance with the Facility Design, which under art. I ' 1.8 is to be ``based upon" the design appended as Exhibit 2-1.8 to the contract. Exhibit 2-1.8 calls for a plant of ``approximately" 15,000 KW and a design turbine discharge capacity of ``approximately" 8,000 cfs. The technical specifications attached as Appendix A to Exhibit 2-1.8 provide that ``design full gate flow is 7,800 cfs." Exhibit 2 to the contract is prefaced by the remark that Combustion Engineering reserves the right to modify the attached specifications ``so long as such modifications do not change the form, fit, or function of the Facility or reduce the quality, durability, performance or efficiency of the Facility or the equipment specified therefor."

[5] Contract art. IV ' ' 4.1 and 4.3 direct Combustion Engineering to comply with FERC and other agency requirements. However, FERC's terms and conditions of the license are ambiguous as to permissible alterations. Project works are to be built ``in substantial conformity" with the approved exhibits (which specify a generating capacity of 14 MW) but minor changes may be made without license modification ``if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development." Exh. 3-1.11 to the contract. Bintz of Combustion Engineering telephoned FERC on August 3, 1988 and learned that FERC's policy had become more rigid than in the past and ``[n]ow, if there is any deviation on plant capacity, the Owner must file either an amendment or file a determination for a Need for Amendment." Exh. BB to Bertoni Affidavit #1. There is no evidence that Combustion Engineering was aware of this need prior to that date.

insist that its work conformed to the contract even after Miller Hydro's Mark Isaacson confirmed and protested the turbines' hydraulic and generating capacities in the summer of 1988. Exhs. 8-9 to Isaacson Affidavit.

B. Of a Material Fact

Miller Hydro's submissions demonstrate that turbine size was material in terms of impact on project design and on licensing by FERC and the Maine Department of Environmental Protection (``DEP"). Devine testified that ``[t]he full gate flow of a hydroelectric project directly impacts certain important engineering aspects of the project, including the design of the approach channel, intake, trashracks, tailrace and fishway." Devine Affidavit & 14. In keeping with this observation, the evidence indicates that the subcontractor responsible for excavation, Cianbro Corporation, sought additional compensation from Combustion Engineering for work to accommodate turbines with a hydraulic capacity of 9,000 cfs. Exhs. L, T & TT to Bertoni Affidavit #2.

As to FERC licensing, Devine testified that ``water utilization is one of the most important factors which FERC considers in connection with the licensing process." Devine Affidavit & 6. Devine explained that Miller Hydro wanted to avoid the need for a FERC license amendment so it could complete the project in time to take advantage of federal tax credits. Devine Affidavit & 8. Devine asserted, ``It was E.C. Jordan's opinion that 7800 cfs was the maximum amount of hydraulic capacity which could be requested from FERC at this stage in the licensing process without triggering a `material change.'" Devine Affidavit & 7. FERC eventually did require a licensing amendment based, *inter alia*, on an increase in generating capacity from 14MW to approximately 18MW.[6] Exh. 11 to Isaacson Affidavit.

[6]FERC has since approved the facility as built. Exh. 2 to Plaintiff Combustion Engineering, Inc.'s Memorandum in Reply to Defendant Miller Hydro Group's Objection to Plaintiff's Motion to Compel.

Miller Hydro's evidence also demonstrates that the change in generating and hydraulic capacities was material in the sense that it triggered the need for a modification to the DEP permit. Exh. 12 to Isaacson Affidavit.

C. Knowingly or Recklessly

Miller Hydro's evidence makes out a *prima facie* case that Combustion Engineering knowingly or recklessly misrepresented turbine size. Combustion Engineering knew the turbines' hydraulic capacity as of May 1986 and their generating capacity as of August 1986. Bintz and Popovitch specifically were informed of the hydraulic data by internal memorandum dated May 21, 1986. Exh. C to Bertoni Affidavit #1. As discussed above, Miller Hydro shows that Bintz and Popovitch misrepresented hydraulic capacity after that date. Even assuming *arguendo* that Combustion Engineering's employees unknowingly misstated turbine capacity, they did so recklessly by failing to verify data available in the company's files.

D. For the Purpose of Inducing Reliance

Miller Hydro's *prima facie* case founders at this stage of the inquiry. Miller Hydro demonstrates that Combustion Engineering pinned its hopes for a profit on the incentive bonus and that Combustion Engineering chose turbines of a large enough capacity to ensure its payment. Exhs. G, H to Bertoni Affidavit #1. Miller Hydro also speculates that Combustion Engineering perpetrated a like fraud in building an unrelated hydroelectric project known as ``Pontook." Defendant's Memo at 4; Exh. II to Bertoni Affidavit #1; Exh. U to Bertoni Affidavit #2. This evidence permits the inference that Combustion Engineering misrepresented turbine size to disguise its plan to reap an unduly large bonus, but it fails to establish the truth of the allegation to a high degree of probability. Combustion Engineering's misrepresentations, although knowing or reckless, may have had nothing to do with its hope to earn the bonus.[7]

E. Complainant Justifiably Relied, to Its Damage

Having concluded that Miller Hydro fails to make out a *prima facie* case as to one of the essential elements of fraud, I need not exhaustively examine the fifth and final element. Suffice it to

[7]Miller Hydro's own evidence demonstrates that it received by letter dated February 28, 1987 a so-called ``one-line diagram" in a manufacturing schedule revealing turbine generating capacity of 8.53 MW each, or 19.06 MW total. Exhs. DD, EE to Bertoni Affidavit #1. Miller Hydro claims that this small legend buried in a mass of pages could not possibly constitute sufficient notice and was in fact overlooked. Regardless, this evidence casts some doubt on whether Combustion Engineering possessed the requisite intent to induce reliance on misrepresentations.

say that I do not believe the materials submitted to date provide clear and convincing evidence of justifiable reliance or a concrete description of the damages allegedly incurred thereby. Significant questions remain as to the clarity of the contract and FERC license in spelling out hydraulic and generating capacity; the reasonableness of Miller Hydro's reliance on generalized assertions of compliance with the contract and FERC requirements; the degree of communication between Miller Hydro and E.C. Jordan during the critical period; and the extent to which the alleged turbine oversize has resulted in actual damages.

III. Request for Pontook Project Documents

Federal Rule of Evidence 26(b)(1) defines relevance broadly for purposes of discovery. A party may discover any unprivileged matter

> which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

I conclude that Miller Hydro's request for Pontook project information meets this relatively low threshold for discoverability. In its original answer and counterclaim, Miller Hydro listed as affirmative defenses, *inter alia*, breach of the duty of good faith and fair dealing, the doctrine of unclean hands and estoppel due to wrongful and fraudulent acts. Miller Hydro also counterclaimed on grounds, *inter alia*, of alleged fraud in the inducement, fraudulent misrepresentation, fraud regarding change order No. 7 and breach of the duty of good faith and fair dealing. Miller Hydro suspects similarities in Combustion Engineering's conduct during the Maine and Pontook projects. Under Fed. R. Evid. 404(b), evidence of ``other crimes, wrongs, or acts'' may be admissible to prove ``motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident." The Pontook materials conceivably could bear on intent or absence of accident concerning the defenses and claims listed above.[8] The discovery request, therefore, is reasonably calculated to lead to evidence that could be admissible in proving the kinds of defenses and counterclaims described above. *See, e.g., Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814, 824 (1st Cir.), *cert. denied*, 464 U.S. 894 (1983) (upholding decision to admit evidence of unrelated ``bad act" as probative of Toyota dealer's motive, intent and possible bad faith in action alleging bad faith in violation of New Hampshire statute). Combustion Engineering contends that this discovery request, in addition, is overbroad and burdensome. I cannot determine, based on the materials placed before me, whether this is the case. Combustion Engineering shall have to and including October 26, 1990 within which to particularize its claim of overbreadth and burdensomeness. Miller Hydro shall then have 7 calendar days within which to respond.

IV. Request for Documents on Past Lawsuits

Miller Hydro asks the court to compel Combustion Engineering to answer its interrogatory asking for information on every lawsuit or dispute in which Combustion Engineering, or any of its owners, shareholders, directors, principals or partners, has been involved in the past ten years. Exh. C to Defendant's Memo at 9-10. Combustion Engineering initially objected to the request on relevancy grounds and provided none of the information sought by Miller Hydro. Later it offered the following supplemental response:

[8] I intimate no opinion at this stage of the proceedings as to the validity of Miller Hydro's claims and defenses.

> Combustion Engineering states, to the best of its present knowledge, that neither its Hydro Power Systems division nor its Power Projects, Inc. subsidiary have been a defendant in a lawsuit within the last five years involving a dispute over turbine size, bonus claims, incentive payments, or allegations of fraud arising out of the construction of a hydroelectric power plant.

Plaintiff's Memo at 23. Combustion Engineering argues that any request for information beyond that provided in its supplemental response is overly burdensome and unduly expensive.

Miller Hydro claims that Combustion Engineering should be compelled to respond to the full scope of the interrogatory because Miller Hydro responded, without objection, to a nearly identical interrogatory from Combustion Engineering. Miller Hydro cites no caselaw to support this proposition, and I find it unpersuasive. Miller Hydro's original interrogatory is overbroad. However, I agree with Miller Hydro that, because Combustion Engineering is a plaintiff in the instant lawsuit, Miller Hydro should have access to certain information regarding past lawsuits in which Combustion Engineering was a plaintiff. I accordingly direct that Combustion Engineering respond as to whether its Hydro Power Systems division or its Power Projects, Inc. subsidiary has been a plaintiff in a lawsuit within the last five years involving a dispute over turbine size, bonus claims, incentive payments or allegations of fraud arising out of the construction of a hydroelectric power plant.

V. Conclusion

For the foregoing reasons, I hereby ***DEFER*** decision on Miller Hydro's request for production of documents on the separate hydroelectric project pending further briefing as ordered herein, partially ***GRANT*** Miller Hydro's request for further information on Combustion Engineering's lawsuits, ***DENY*** Miller Hydro's remaining requests and ***GRANT*** Combustion Engineering's cross-motion for the return of 33 privileged documents.

Because of the complexity of the issues involved and lack of controlling caselaw, I decline to award the expenses of the instant motions to either party.

Dated at Portland, Maine this 19th day of October, 1990.

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David M. Cohen
United States Magistrate